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You Got Served: Why an Excusable Neglect Standard Should Govern Extensions of Service Time After Untimely Service Under Rule 4(M)

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YOU GOT SERVED: WHY AN EXCUSABLE NEGLECT STANDARD SHOULD GOVERN EXTENSIONS OF SERVICE TIME AFTER UNTIMELY SERVICE UNDER RULE 4(M)

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INTRODUCTION

Imagine that your mortal enemy is your adversary in a litigation proceeding. After waiting until the day before the relevant statute of limitations expires, he files a complaint against you in federal court. He then fails to serve process on you within the 120-day time period mandated by Rule 4 of the Federal Rules of Civil Procedure.[1] As a result, you are unaware of the impending action and are unable to effectively gather your resources to defend the suit. Upon realizing that he missed the deadline, your adversary moves for an extension of the service period under Rule 6(b), but this motion is untimely as well because the deadline to move for an extension has already expired. Thus, before the case has even begun in earnest, your adversary has already wasted a considerable amount of time: He waited until the last minute to file the complaint, missed the service deadline, *and* missed the extension deadline. Would you be happy if a judge could grant the extension of service at his own discretion despite your adversary's wrongdoings, or would you argue that he should face a more difficult standard to keep his suit alive? If your adversary secured the extension, would you not argue that the judge has essentially rewarded him for laziness and inattention to the Federal Rules of Civil Procedure?

The Federal Rules of Civil Procedure exist to "secure the just, speedy, and inexpensive determination of every action"

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[1] *See* FED. R. CIV. P. 4(m).

brought in federal court.[2] Accordingly, Rule 4 states expressly that a plaintiff must serve a defendant with process within 120 days after filing an action or else face the potential dismissal of the suit.[3] Service notifies a defendant of an impending suit and allows a defendant to adequately prepare for litigation.[4] Under Rule 4, a defendant may bring a Rule 12(b)(5) motion to dismiss, or a federal judge may dismiss the case on his or her own initiative, if a plaintiff fails to properly serve a defendant within the 120-day time limit prescribed in Rule 4(m).[5] A plaintiff whose case is dismissed for lack of service will normally be able to re-file the action, as Rule 4 states that dismissal for lack of proper service should be without prejudice.[6] If the statute of limitations has run between the time the suit is filed and the time the suit is dismissed for lack of proper service, however, a plaintiff will be unable to refile.[7]

Although the 120-day requirement in Rule 4(m) is firm, it is not inflexible.[8] A plaintiff who realizes that service may not be achieved within 120 days may move for an extension of the service period under Rule 6(b)—the provision of the Federal Rules of Civil Procedure that concerns time extensions in general. Rule 6(b) contains two separate standards for granting a motion for time extension. If the plaintiff moves for an extension before the relevant time period has elapsed, the court will grant the extension if the delay was "for good cause."[9]

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[2] *Id.* 1.

[3] *Id.* 4(m). The rule states, in relevant part:

> If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Id.

[4] *See* Elec. Specialty Co. v. Road & Ranch Supply, Inc., 967 F.2d 309, 314 (9th Cir. 1992).

[5] *See id.* 4(m),12(b)(5).

[6] *See id.* 4(m).

[7] *See* Catz v. Chalker, 142 F.3d 279, 286–87 (6th Cir. 1998), *amended by* 243 F.3d 234, 234 (6th Cir. 2001).

[8] *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137, at 341–42 (3d ed. 2002).

[9] See FED. R. CIV. P. 6(b).

Typically, this means that the extension is freely granted.[10] If, however, the plaintiff moves to extend the time period after it has expired, a court may only grant the extension if the plaintiff can show that the delay resulted from "excusable neglect."[11]

Rule 4(m) also allows courts to extend the 120-day service period. Rule 4(m) has been interpreted by nearly every federal court to contain two standards that govern service period extensions. First, if the plaintiff can show "good cause" for the failure to serve the defendant, the court *must* grant an extension. Second, if the plaintiff fails to show "good cause" for the failure to serve the defendant, the court may nonetheless grant an extension according to its own judicial discretion.[12] With service extension standards emanating from two separate Federal Rules of Civil Procedure, it is not surprising that a circuit split has developed regarding the extension of service time.

Courts disagree over which Rule governs a motion for an extension after the 120-day service period has lapsed.[13] The Fifth and Sixth Circuits, relying on the standard laid out in Rule 6(b), held that a plaintiff must demonstrate "excusable neglect" before a judge may grant such an extension; on the other hand, the Seventh, Ninth, and Eleventh Circuits held that Rule 4(m) allows a judge to extend the service period at his own discretion.[14] It is the tension between the "excusable neglect" standard in Rule 6(b) and the "judicial discretion" standard in Rule 4(m) with which this Note is concerned.[15]

This Note argues that circuit courts should adopt Rule 6's "excusable neglect" standard in lieu of Rule 4's "judicial discretion" standard when a plaintiff fails to meet the 120-day

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[10] *See* Arroyo v. Wheat, 102 F.R.D. 516, 518 (D. Nev. 1984) (describing timely Rule 6(b) extensions as "liberal").

[11] See FED. R. CIV. P. 6(b).

[12] Though Rule 4(m) does not explicitly state this proposition, courts generally agree that Rule 4(m) should be interpreted to mean that "if good cause for the delay is shown, the court must extend the time for service, while if good cause is not shown, the court has a choice between dismissing the suit and giving the plaintiff more time." United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006) (emphasis omitted).

[13] *See id.*

[14] *Compare id.* (permitting a judge to use discretion in deciding whether to grant an extension), *with* McGuire v. Turnbo, 137 F.3d 321, 324 (5th Cir. 1998) (following the "excusable neglect" standard).

[15] For a more detailed analysis of the two standards and their application in federal court, see *infra* Part II.

service deadline and fails to move for an extension within the 120-day period. Part I of this Note examines Rule 4's statutory history and its application in federal court. Part II discusses the genesis of the circuit split and the approach taken by each side. Part III uses a Seventh Circuit case, *United States. v. McLaughlin*, to illustrate how the two standards may lead to different, and sometimes unfavorable, results in federal court. Finally, Part IV argues for an "excusable neglect" standard because it more strongly upholds the purpose of the Federal Rules of Civil Procedure, discourages misuse of judicial discretion, adequately motivates plaintiffs to serve defendants properly, and penalizes delinquent plaintiffs accordingly.

I. THE EVOLUTION OF RULE 4(M) AND ITS APPLICATION IN FEDERAL COURT

Rule 4 governs service of process on a defendant in a civil action and has been coined the "key instruction of the Federal Rules of Civil Procedure on the commencement of a federal civil action."[16] Stated simply, Rule 4 governs all things related to the summons and its service upon a defendant, including the contents of the summons itself; the requirements for proper service upon individuals, corporations, and government entities, waiver of service; and time requirements for proper service.[17] Given its importance to the commencement of an action, as well

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[16] David D. Siegel, *Developments in Federal Jurisdiction and Practice: Personal Jurisdiction, Supplemental (Pendent and Ancillary) Jurisdiction, Venue, and Removal, in* CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 1996, at 7, 16 (Practising Law Institute ed., 1996)). Siegel goes on to note that, while Rule 3 bears the title "Commencement of Action" and states that a civil action commences with the filing of a complaint, "[i]t is the summons and its service that really determines how the case gets going." *Id.* (internal quotation marks omitted). Thus, Rule 4 and its requirements are, practically speaking, much more crucial than those in Rule 3 to a plaintiff in the commencement of a civil action. *See id.* Siegel further elaborates on the importance of Rule 4 to the commencement of an action and the attention to detail that a plaintiff and his lawyer must devote in order to successfully comply with Rule 4:

> Against the line or two of type that Rule 3 occupies are the many lines that make up Rule 4. That ratio speaks worlds about the relative demands that the two rules make on the lawyer's attention. Add in the fact that the moment of commencement of the action is all bound up with that most talented enemy of the plaintiff—the statute of limitations—and the conclusion is plain: as demanding as Rule 4 may be, a mistake in its use can be fatal.

Id.

[17] *See* FED. R. CIV. P. 4.

as its sheer volume of demands and requirements, Rule 4 "has no small number of pitfalls."[18] Though pitfalls abound throughout Rule 4, this Note focuses on the difficulty encountered in Rule 4(m)—the 120-day time limit requirement for service of process on a defendant.[19]

A. *The Evolution of Rule 4(m)*

1. Rule 4 and Service Time Requirements Before 1983

Prior to 1983, the Federal Rules of Civil Procedure did not specify a time limit for service of process. Rule 4—enacted in 1938 as one of the original Federal Rules of Civil Procedure—contained the familiar provisions dealing with "(1) the issuance, form, and method of service of process upon different classes of defendants; (2) the territorial limits of effective service; (3) the return; and (4) the amendment of process."[20] Conspicuously absent was a provision that directed that service be made within a specified time period. Presumably, this is because the original "Rule 4(c) directed that all process was to be served by a [federal] marshal, a deputy, or a person specially appointed by the court."[21] With impartial and presumably responsible federal marshals administering service in the vast majority of cases, a specific time limit was simply unnecessary.[22] Courts, instead, applied a "due diligence" standard to examine whether process had been served inexcusably late on a defendant.[23] As David Siegel explains in his commentary to Rule 4, "[a]s long as the delay [in service of process] was not outrageous, the courts, when an issue of tardiness came before them, were disposed to allow late service, or new service to correct some perceived imperfection in the first service."[24]

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[18] Siegel, *supra* note 16.

[19] *See* FED. R. CIV. P. 4(m).

[20] Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1195 (1987). For an exhaustive account of the historical significance and development of service of process in the United States, see *id.* at 1183–1214.

[21] *Id.* at 1198.

[22] *See* Siegel, *supra* note 16, at 31 ("That the marshals were the main process servers . . . supported a tacit if not explicit presumption that things were proceeding reasonably.").

[23] *See id.*

[24] *Id.*

2. The 1983 Amendments to Rule 4: The Imposition of a 120-Day Service Requirement and Its Application in Federal Court

Rule 4 remained relatively unchanged until 1983 when Congress amended it significantly in an effort to eliminate the federal marshal's role in service of process in civil cases.[25] In effect, the 1983 amendments had four goals: "(1) to reduce the role of the federal marshal in summons service, (2) to broaden the category of persons authorized to serve process, (3) to establish the availability of service by mail, and (4) to set specific time limits for service of process."[26] While seemingly unrelated, each of these four goals served the same purpose. As marshals were phased out of the service scheme, plaintiffs were given greater responsibility in serving process.[27] For instance, the revised Rule 4(c) allowed for "any adult nonparty other than the attorney to serve process."[28] With such greater responsibility came increased flexibility in service methods[29] and greater judicial structure to the time period in which service could be made. Plaintiffs, unlike federal marshals, could not be trusted to deliver service in a reasonable time period; hence, the 120-day service requirement was born.[30] The original text of the 120-day requirement—put into effect in 1983 as subdivision (j)—read as follows:

> (j) Summons: Time Limit for Service.
>
> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made

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[25] *See* Sinclair, *supra* note 20, at 1198 (documenting that, in 1978, the Director of the United States Marshal Service fervently lobbied the Advisory Committee on Civil Rules for a Rule 4 amendment because "the obligation to serve process in federal civil litigations had become a serious financial burden" on the Marshal Service).

[26] *Id.* at 1211–12.

[27] *See id.* at 1202–03.

[28] *Id.* at 1203.

[29] *See* FED. R. CIV. P. 4(e)(1) (allowing proper service to be effected if service is "in the state where the district court is located or where service is made"); *see also* Sinclair, *supra* note 20, at 1213–14 ("Courts generally appear to espouse a rule of construction that if the procedure followed can be characterized as within the contemplation of either a recognized federal or viable state procedure, service will be upheld.").

[30] *See* Sinclair, *supra* note 20, at 1215–16.

> within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.[31]

Judicial interpretation of Rule 4(j) was fairly straightforward. A plaintiff had 120 days after a complaint was filed to serve a defendant. If the plaintiff failed to serve the defendant within the 120-day requirement, a defendant could move to dismiss the action or the court could dismiss the action sua sponte. A plaintiff could avoid such dismissal only upon showing "good cause" for the failure of service.[32] Thus, absent good cause for the delay, a federal judge had no choice but to dismiss the case (albeit without prejudice).[33] This scenario, of course, left little wiggle room for a tardy plaintiff, especially considering that "inadvertence of counsel [did] not qualify as 'good cause' " to avoid a dismissal.[34] As one district court agreed, "Rule 4(j) is meant to be strictly construed."[35] Although the 120-day requirement seemed excessively harsh on its face, struggling plaintiffs were not without remedy—a plaintiff could move for an extension of the service period under Rule 6(b),[36] thus proactively avoiding the potentially disastrous effects that failure to serve a defendant could bring under Rule 4(j).[37]

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[31] Act of Jan. 12, 1983, Pub. L. No. 97-462, 96 Stat. 2527 (codified as amended at FED R. CIV. P. 4(m) (orignally codified as FED. R. CIV. P. 4(j))) (internal quotation marks omitted).

[32] *See* Bryant v. Rohr Indus., Inc., 116 F.R.D. 530, 532 (W.D. Wash. 1987) ("[Rule] 4 requires that the court grant a defendant's Motion for Dismissal when service of process has not been properly effected, unless the plaintiff can show good cause why service was not effected according to the rule.").

[33] *See id.*

[34] Ruley v. Nelson, 106 F.R.D. 514, 518 (D. Nev. 1985). For a more in-depth discussion of what constitutes "good cause" under the Rule 4 time limit for service of process, see *infra* Part I.B.

[35] *Ruley*, 106 F.R.D. at 517.

[36] *See* FED. R. CIV. P. 6(b). For further discussion of Rule 6(b) as it relates to the service of process requirements in Rule 4, see *infra* Part I.D.

[37] *See* Arroyo v. Wheat, 102 F.R.D. 516, 518 (D. Nev. 1984) ("It was not intended that Rule 4(j) would be enforced harshly; that is why liberal extensions of time are permitted under Rule 6(b).").

3. The 1993 Amendments: The Birth of the Modern-Day Rule 4(m) and Its Application in Federal Court

In 1993, only ten years after its introduction into the Federal Rules of Civil Procedure, the subsection governing the time limit for service of process was amended. Although much of the statutory language was adopted wholesale from the former Rule 4(j), the new Rule 4(m) evidenced a congressional desire to mitigate some of the harsher effects of Rule 4(j) on tardy plaintiffs whose suits might otherwise be dismissed for lack of good cause. The text of the amended Rule 4(m) stated:

> (m) Time Limit for Service.
>
> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).[38]

Upon a cursory glance at 4(m), one might not actually identify any significant changes from the former Rule 4(j). Indeed, the time limit remains 120 days and upon failure to serve, a defendant may move to dismiss via motion or the court may dismiss the action on its own initiative. In addition, upon a showing of "good cause" by a tardy plaintiff, the court must extend the time for service and deny a defendant's motion to dismiss.

There exists, however, a slight nuance in Rule 4(m) that works heavily to a plaintiff's advantage. Rule 4(m), unlike the former 4(j), states that upon a delinquent service, the court "shall dismiss the action without prejudice as to that defendant *or direct that service be effected within a specified time.*"[39] Thus, unlike under former Rule 4(j), courts are actually presented with an option when a plaintiff fails to serve in 120 days and cannot show good cause for the failure—instead of having no choice but to dismiss the case, courts may "direct that service be effected

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[38] FED. R. CIV. P. 4(m) (amended 2007).

[39] *Id.* (emphasis added).

within a specified time."[40] Since the 1993 amendments, Rule 4(m) has been interpreted by nearly every circuit court to mean the following: If a plaintiff fails to timely serve and can show good cause for the failure, the court *must* extend the period for service. If, however, a plaintiff fails to serve and cannot show good cause for the failure, the court may dismiss the case *or, at its discretion*, extend the time period for service.[41] The Advisory Committee's notes regarding the 1993 amendments support this reading:

> "[Rule 4(m)] provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown."[42]

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[40] *Id.*

[41] *See* Thompson v. Brown, 91 F.3d 20, 21 (5th Cir. 1996); Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340 (7th Cir. 1996); MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1098 (3d Cir. 1995) (quoting Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995)). The Fourth Circuit, however, appears to be the only circuit in disagreement on this point. In *Mendez v. Elliot*, 45 F.3d 75 (4th Cir. 1995), the Fourth Circuit held that Rule 4(m) does not allow for judicial discretion when plaintiff has failed to serve defendant within 120 days and cannot show good cause for the failure, stating explicitly that "Rule 4(m) requires that good cause be shown for obtaining an extension." *Id.* at 80. The court, however, may have made a costly mistake. Indeed, in *Mendez* the court noted that "[former] Rule 4(j) was edited without a change in substance and renumbered as Rule 4(m)." *Id.* at 78. It appears as though the Fourth Circuit failed to observe the addition to Rule 4(m) of the phrase "order that service be made within a specified time." FED. R. CIV. P. 4(m). A number of district courts within the Fourth Circuit have refused to follow the *Mendez* holding and, although *Mendez* has not been explicitly overruled, it appears as though it is no longer good law. *See* Hammad v. Tate Access Floors, Inc., 31 F. Supp. 2d 524, 526 (D. Md. 1999) (declining to follow *Mendez* and stating that "[w]hile the court acknowledges that it is not free to ignore valid Fourth Circuit precedent merely because the overwhelming weight of circuit court authority is to the contrary, the court believes that the continued vitality of *Mendez* is seriously in doubt" (internal citation omitted)). At any rate, it appears as though the issue has been settled, owing to Justice Ginsberg's dictum in a Supreme Court case from 1996. *See* Henderson v. United States, 517 U.S. 654, 662–63 (1996). Ginsberg confirmed that "[m]ost recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period 'even if there is no good cause shown.' " *Id.* (quoting FED. R. CIV. P. 4 advisory committee's notes).

[42] FED. R. CIV. P. 4 advisory committee's note, *reprinted in* Amendments to the Federal Rules of Procedure, 146 F.R.D. 401, 573 (1993).

In effect, Rule 4(m) relaxes the standard set forth in former Rule 4(j), although a plaintiff who seeks the benefit of the relaxed rule essentially "throws himself on the the mercy of the district court."[43]

4. The 2007 Amendments

Rule 4(m) was again amended in 2007.[44] Unlike the previous two amendments to the rule, however, pertinent information was neither added to nor detracted from the statutory language in this amendment. The 2007 amendments were essentially made to tidy up the language of Rule 4(m)—among others in the Federal Rules of Civil Procedure—and have no substantive effect on their application in case law. Indeed, as the Committee Note following Rule 4 states, "[t]he language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."[45] The amended Rule 4(m) reads as follows:

> (m) Time Limit for Service.
>
> If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).[46]

Judging from the statutory language of the 2007 amendments, it appears clear that Rule 4(m) has not changed in substance from its 1993 version. Because the amendments do

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[43] United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006) (outlining the judicial interpretation of Rule 4(m) and noting that "if good cause for the delay is shown, the court *must* extend the time for service, while if good cause is not shown, the court has a choice between dismissing the suit and giving the plaintiff more time").

[44] Orders Adoptng and Amending Rules and Forms, 2007 U.S. Order 30 (C.O. 30) (2007).

[45] *Id.*

[46] *Id.*

not affect the substance of Rule 4(m), it seems highly likely that courts will continue to interpret Rule 4(m) as they did prior to the 2007 amendments.

B. What is "Good Cause?"

Thus far, this Note has discussed the evolution of Rule 4(m) and the judicial treatment it has received in federal court. This Section examines the term "good cause" as it relates to a delay in service of process and discusses the factors on which courts rely when determining whether to extend the service period when no such "good cause" is found.

1. Good Cause

Because a finding of "good cause" mandates an extension of the service period, it is crucial for courts to maintain the difficult balance between, as Charles Wright and Arthur Miller write, "the clear intent of Rule 4(m) and the desire to provide litigants their day in court. Insisting on a timely service of process and assuring litigants a just adjudication on the merits of an action are not inconsistent, but over-emphasis on either could lead to undesired consequences."[47] Courts have employed a multi-factor balancing test to determine whether or not a plaintiff had good cause for his or her delay in service.[48] However, as David Siegel points out, "[c]ases on what does and what doesn't qualify as 'good cause' for a time extension are all over the lot. There is no way to reconcile all of them . . . ."[49] Thus, a consistent definition of "good cause" has not emerged from the circuits.

Although the circuits differ slightly in their approaches, most have engaged in a balancing test of sorts, using similar criteria to determine whether good cause exists.[50] For example, district courts in the Second Circuit have declared that "[t]wo factors are relevant: (1) the reasonableness and diligence of plaintiff's efforts

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[47] *See* 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 373.

[48] At this juncture it is important to note that the definition and application of "good cause" has essentially remained constant since 1983 when the phrase was first introduced into Rule 4. Thus no additional commentary is needed to differentiate between "good cause" in pre-1993 cases and post-1993 cases. Of course, the actions that a court may take after finding that no good cause exists varies drastically in pre-1993 and post-1993 case law. For further discussion of this point, see *infra* Part I.B.2.

[49] Siegel, *supra* note 16, at 40.

[50] *See infra* notes 51–56.

to serve; and (2) the prejudice to defendants from the delay."[51] Other circuits employ a more vague standard, looking to the pre-1983 standard of "due diligence,"[52] while still others equate "good cause" with "excusable neglect,"[53] the standard for extensions of time under Rule 6(b)(1)(B).[54] At any rate, nearly every circuit agrees with the basic principle that "the purpose of Rule 4(m) is to prod the slow-footed plaintiff, not to reward the crafty or evasive defendant."[55] Consequently, nearly every circuit attempts to balance the plaintiff's good faith effort to effect service with the defendant's avoidance of service and also examines the prejudice done to both parties if the case were to be decided one way or the other.[56]

2. Factors Affecting a Court's Discretionary Extension of Service Time Absent Good Cause

As noted earlier,[57] the 1993 amendments allowed courts to extend the service period for a plaintiff who fails to meet the 120-day service requirement, even if the plaintiff cannot show good cause for the delay. Although the standard employed by the courts is described as "the sound exercise of its discretion,"[58] courts have recognized that "[t]he rule specifies no criteria for the exercise of mercy."[59] The following factors have been considered and weighed by most courts in determining whether to grant a discretionary extension: lack of prejudice to defendant, relevant statutes of limitations, the perceived efforts of defendants to

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[51] Bloomer v. City of N.Y., No. CV 89-592(RR), 1994 WL 92388, at *4 (E.D.N.Y. Mar. 3, 1994).

[52] *See* D'Amario v. Russo, 750 F. Supp. 560, 563 (D. R.I. 1990).

[53] *See* MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d Cir. 1995) (noting that although Rule 4(m) does not define "good cause," it is generally equated with "excusable neglect" under FRCP 6(b)(2)). For a further discussion of Rule 6(b), the "excusable neglect" standard, and how it relates to Rule 4(m), see *infra* Part I.D.

[54] FED. R. CIV. P. 6(b)(1)(B).

[55] 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 394.

[56] David Siegel is quick to point out, however, that "[p]laintiffs must bear in mind that in the experience of the law generally, 'cause' implies a reason and 'good cause' a good reason, a standard under which judges have not readily forgiven what they perceive as mere laxity or casualness." Siegel, *supra* note 16, at 41.

[57] *See supra* Part I.A.3 (discussing the 1993 amendments to Rule 4(m)—specifically, the addition of a clause which grants a court the discretion to extend the service period for a delinquent plaintiff without showing of good cause).

[58] McCurdy v. Am. Bd. of Plastic Surgery, 157 F.3d 191, 196 (3d Cir. 1998).

[59] United States v. McLaughlin, 470 F.3d 698, 700 (7th Cir. 2006).

evade service, and the perceived efforts of plaintiffs to effect service.[60] Notably, many of these factors are also present in a court's analysis of whether good cause exists for the plaintiff's delay.

C. *The Importance of a Dismissal Under Rule 4(m) Despite the Statutory Requirement That the Dismissal Be Without Prejudice*

Rule 4(m) explicitly states that any dismissal for failure to properly serve within 120 days is without prejudice.[61] In most circumstances, the upshot of a dismissal without prejudice is that a plaintiff may once again file a suit in court as though the original suit had never been filed.[62] A dismissal without prejudice, however, effectively precludes a plaintiff from refiling suit if any relevant statutes of limitations have expired after filing the original suit.[63] As the Seventh Circuit noted, "[d]ismissal . . . without prejudice does not mean without consequence. If the case is dismissed and filed anew, the fresh suit must satisfy the statute of limitations."[64] Hence, the dawdling plaintiff who waits until the end of the relevant statute of limitations to bring suit risks an outright dismissal if he or she fails to serve a defendant within the 120-day time period. Although most courts examine the expiration of a statute of

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[60] *See* Efaw v. Williams, 473 F.3d 1038, 1040–41 (9th Cir. 2007) (holding that courts making extension decisions under Rule 4(m) may take the following factors into account: statute of limitations bar, prejudice to the defendant, defendant having actual notice of the lawsuit, defendant evading service, defendant concealing a defect in attempted service, and length of delay before eventual service); *McLaughlin*, 470 F.3d at 700–01; Troxell v. Fedders of N. Am., Inc., 160 F.3d 381, 383 (7th Cir. 1998) (listing the factors included in a district court's decision to make an extension at its discretion, but noting, quite succinctly, that a discretionary extension will not be granted if the plaintiff is "largely to blame" for the delay). *Efaw* appears to present the most complete list of factors that courts routinely analyze when deciding to grant an extension without good cause. *Efaw*, 473 F.3d at 1041.

[61] FED. R. CIV. P. 4(m).

[62] *See* 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 379–87.

[63] *See id.* ("The dismissal-without-prejudice provision allows a plaintiff to refile the complaint as if it had never been filed, but it does not provide relief from defenses based on the passage of time, such as the statute of limitations.").

[64] Tuke v. United States, 76 F.3d 155, 156 (7th Cir. 1996) (internal quotation marks omitted).

limitations as a factor in considering whether to extend the service period, the mere expiration of a statute of limitations alone will not necessarily tip the scales in the plaintiff's favor.[65]

D. An Ace up the Sleeve: Plaintiff's Ability To Move for an Extension of Service Time Via Rule 6(b) and Its Relationship with Rule 4(m)

The difficulty in determining whether a court should grant a service extension is made more complex by Rule 6(b). Rule 6(b) governs time for the Federal Rules of Civil Procedure in general and allows a plaintiff to move for an extension of time in certain circumstances.[66] By its terms, Rule 6(b) applies to plaintiffs seeking an extension of the 120-day period for service of process. The statutory text of Rule 6(b) reads, in part, as follows:

> (b) Extending Time.
>
> (1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.[67]

Rule 6(b)'s text makes clear that a motion for an extension of time is more freely granted when the motion is made before the expiration of the relevant time period that the plaintiff is seeking to extend. The first prong of Rule 6(b), which concerns motions made *before* the expiration of the relevant time period, allows a judge to grant a motion for extension as long as it is made "for good cause."[68] As noted earlier, extensions made in such a timely manner are liberally granted.[69] Conversely, if a plaintiff is late in moving to extend the time period, a judge may only grant the motion if the delay was the result of "excusable neglect."[70] "Excusable neglect" is, unsurprisingly, another term of art. The

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[65] *See* Johnson v. Fleet, 371 F. Supp. 2d 155, 157–58 (D. Conn. 2005).

[66] *See* FED. R. CIV. P. 6(b)(2).

[67] *Id.* 6(b)(1).

[68] *See id.*

[69] *See* Arroyo v. Wheat, 102 F.R.D. 516, 518 (D. Nev. 1984); *see also supra* note 10 and accompanying text.

[70] *See* FED. R. CIV. P. 6(b)(1).

standard accounts for essentially all of the relevant circumstances of a case and has been likened to the "good cause" standard used in Rule 4(m).[71] It is the relationship between Rule 4(m)'s "judicial discretion" standard and Rule 6(b)'s "excusable neglect" standard that provides the foundation for the circuit split with which this Note is concerned.

II. EXCUSABLE NEGLECT VERSUS JUDICIAL DISCRETION: TWO METHODS BY WHICH CIRCUITS HAVE HANDLED THE QUANDRY OF THE PLAINTIFF WHO MOVES FOR AN EXTENTION OF THE SERVICE PERIOD AFTER THE 120-DAY TIME LIMIT HAS ALREADY EXPIRED

As noted earlier, courts roundly agree that a tardy plaintiff's case *must* survive a motion to dismiss if the plaintiff can show "good cause" for the failure to serve and *may* survive absent "good cause" if the court so allows in its discretion.[72] However, while courts have reached a consensus on the interpretation of Rule 4(m) as it stands alone, courts disagree over the standard that guides a court when a plaintiff moves for an extension of service time *after* the 120-day service requirement has expired. The following Section analyzes the two approaches that circuits have followed.

A. *The Judicial Discretion Approach*

The "judicial discretion" approach—adopted by the Seventh, Ninth, and Eleventh Circuits—is quite simple. Upon an initial motion to enlarge the time period for service, a court need look only to Rule 4(m).[73] As noted earlier, a plaintiff under Rule 4(m) need not show good cause for the delay (although good cause certainly makes things easier on the plaintiff) but may instead rely upon the court's discretion in allowing his or her case to survive.[74] In a recent Seventh Circuit case, the court opined that the differences in standards between Rule 6(b) and Rule 4(m) may have been accidental or may be disparate because Rule 6(b)

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[71] *See* United States v. McLaughlin, 470 F.3d 698, 700–01 (7th Cir. 2006) ("Neglect is excusable (though not justifiable—'neglect' implies lack of justification) if there is a reason, which needn't be a compelling reason, to overlook it . . . , but it will not suffice if no excuse at all is offered."); MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d Cir. 1995) (likening the excusable neglect standard to the good cause standard in Rule 4(m)).

[72] *See supra* Part I.A.3.

[73] *See McLaughlin*, 470 F.3d at 700.

[74] *See supra* text accompanying notes 38–42.

considerations often concern the finality of litigation while Rule 4(m) considerations merely concern the commencement of litigation:

> Rule 6(b)(2) is less generous to dawdlers than Rule 4(m), not only in requiring the plaintiff to show excusable neglect if his motion for an extension is itself untimely, but also in not requiring the judge to grant the motion even if good cause is shown. The difference in standards may be accidental, or may reflect the fact that ignoring litigation deadlines delays the finality of litigation . . . whereas missing service deadlines merely postpones the commencement of litigation.[75]

At any rate, the circuits that follow the judicial discretion approach need not look to the text of 6(b) at all during the initial motion for extension; Rule 4(m) alone governs the extension. Rule 6(b) is, however, implicated if the plaintiff is granted a first extension, misses the extended deadline, and then moves to extend the service period a second time.[76] Practically speaking, the judicial discretion approach gives the plaintiff an extra opportunity to procrastinate before facing the harsher standard in Rule 6(b).

B. The Excusable Neglect Approach

The excusable neglect approach—adopted by the Fifth and Sixth Circuits—is also simple. Whereas the judicial discretion approach ignores Rule 6(b) and follows the Rule 4(m) standard, the excusable neglect approach does the opposite. When a plaintiff moves to enlarge the period for service after the 120-day period has expired, followers of the excusable neglect approach look simply to the language of Rule 6(b), drawing from it the rule that a court may only grant such an extension upon a showing of excusable neglect.[77] Interestingly, these courts have often failed to explain their reasoning.[78] Rather, the court opinions read as though there is no choice at all between approaches and that an

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[75] *McLaughlin*, 470 F.3d at 700 (citation omitted) (emphasis omitted).

[76] *See id.* ("Rule 4(m) authorizes the district court, in a case in which the 120 days have elapsed, to 'direct that service be effected within a specified time'; only if the plaintiff failed to meet the new deadline and filed a motion for an extension of time would Rule 6(b)(2) come into play." (emphasis omitted)).

[77] *See* Turner v. City of Taylor, 412 F.3d 629, 650 (6th Cir. 2005).

[78] *See id.*

explanation of the choice to follow Rule 6(b) is superfluous.[79] As this Note later explains, the absence of such an explanation is not surprising.[80]

III. *UNITED STATES V. MCLAUGHLIN*: HIGHLIGHTING THE DIFFERENCES IN PRACTICAL APPLICATION BETWEEN THE JUDICIAL DISCRETION AND EXCUSABLE NEGLECT APPROACHES

The practical differences between the excusable neglect approach and the judicial discretion approach are best exemplified in *United States v. McLaughlin*, a case in which the Seventh Circuit adopted the judicial discretion approach in lieu of the excusable neglect approach.[81] The court's choice effectively dictated the outcome of the case in *McLaughlin* and will likely influence the outcome of future cases in the Seventh Circuit.

In *McLaughlin*, defendant Thomas McLaughlin allegedly accumulated nearly three million dollars in unpaid income taxes.[82] The federal government brought suit in federal district court but waited until only five days before the expiration of the lengthy ten-year statute of limitations to file its complaint.[83] Because McLaughlin did not waive service, the federal government was required to properly serve process on McLaughlin.[84] The federal government, citing "unspecified budgetary considerations," failed to hire a professional process server to serve McLaughlin and instead instructed an IRS officer to serve McLaughlin.[85] The IRS officer left the complaint at McLaughlin's office, handing the complaint to his daughter because McLaughlin was not present.[86] Unbeknownst to the IRS officer, such an attempt at service was improper under Rule 4.[87] By the time the government's lawyer realized that process had not been properly served, the 120-day service deadline had

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[79] *See id.*

[80] *See infra* Part IV.

[81] 470 F.3d 698, 700 (7th Cir. 2006).

[82] *See id.* at 699.

[83] *Id.*

[84] *See id.*

[85] *Id.* (internal quotation marks omitted).

[86] *Id.*

[87] *See id.*; *see also* FED. R. CIV. P. 4(e)(2). The Seventh Circuit noted that service was not proper at the office because "there might be so many people at a defendant's place of business that process left with one of them might very well not reach the defendant." *McLaughlin*, 470 F.3d at 699.

expired. The government then moved to extend the service period, which the district judge granted.[88] The government only then hired a professional process server, who was unable to properly serve McLaughlin during the extension period. The government moved again for an extension, which was again granted by the district judge.[89] Defendant was finally served during this second extension period, 271 days after the initial complaint was filed.[90] McLaughlin moved to dismiss for lack of proper service.[91] Although the district court found that the government did not show good cause for the delay under Rule 4(m), the court nonetheless denied McLaughlin's motion to dismiss.[92]

On appeal, the Seventh Circuit adopted Rule 4(m)'s judicial discretion approach and determined that the government's untimely motion to extend the service period was not fatal to its case, stating that "[t]his case is a good example of the wisdom of Rule 4(m) in allowing a judge to excuse a delay in service even if the plaintiff has no excuse at all."[93] The court held that the Seventh Circuit should use the judicial discretion approach the first time a plaintiff moves for an extension after the 120-day service period has expired and that the excusable neglect approach should only come into play when a plaintiff moves for another extension after the first extension has also expired.[94]

Crucial to the analysis in this case was whether the government had good cause for its delay in service. As noted, the government did not hire a professional server due to "budgetary considerations."[95] The court, however, recognized that such budgetary considerations did not prevent the government from eventually hiring a professional server.[96] Given the federal government's sophistication and resources, there is little reason to believe that the government had good cause in not hiring a professional server and instead entrusting service to an IRS officer who was evidently unfamiliar with proper service under

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[88] *McLaughlin*, 470 F.3d at 699.
[89] *Id.*
[90] *Id.*
[91] *See id.*
[92] *Id.* at 700.
[93] *Id.* at 701.
[94] *See id.* at 700.
[95] *Id.* at 699 (internal quotation marks omitted).
[96] *See id.* at 701.

Rule 4. Also relevant to the analysis was whether McLaughlin actively evaded service. Although it indeed seemed suspicious that a professional server could not reach McLaughlin for months, the district court found, and the Seventh Circuit accepted, that McLaughlin did not evade service.[97] Thus, as the court noted, "the government has not much in the way of excuses for missing the deadline in this case by almost five months."[98]

Because the government had essentially no excuse for failing to properly serve McLaughlin, the excusable neglect approach would yield a different outcome in *McLaughlin* than that resulting from use of the judicial discretion approach. Indeed, the court even noted that "it could make a difference in this case whether excusable neglect is a precondition to granting an untimely motion for an extension of time within which to serve the complaint."[99] The court recognized that "[n]eglect is excusable . . . if there is a reason, which needn't be a compelling reason, to overlook it . . . but it will not suffice if no excuse at all is offered or if the excuse is so threadbare as to make the neglect inexplicable."[100] In *McLaughlin*, the government argued that budgetary considerations prevented it from hiring a process server and that McLaughlin evaded service. Because the court was persuaded by neither argument,[101] it appears as though the government's excuse was indeed so threadbare that its neglect was inexcusable. Furthermore, because some courts equate excusable neglect with good cause, and because the McLaughlin Court found that no good cause existed, it likely would have granted McLaughlin's motion to dismiss if it employed the excusable neglect approach.

A compelling aspect of the case is the manner in which the Seventh Circuit used its "discretion" to grant the government's time extension. Although aware that the government was partially undeserving of an extension because of its errors in serving process and its delay in filing the complaint until five days prior to the ten-year statute of limitations, the court paid lip service to these factors. Instead, the court focused heavily on the fact that McLaughlin was apparently not prejudiced by the

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[97] *See id.*

[98] *Id.*

[99] *Id.* at 700.

[100] *Id.* at 700–01 (citations omitted) (parenthetical omitted).

[101] *See id.* at 699, 701.

government's failure to serve process on him.[102] While prejudice to the parties is certainly a factor in granting a discretionary extension, it is not the only factor.[103] In a somewhat subtle manner, the court mentioned the government's inexcusable conduct without actually balancing it against its effects on McLaughlin.

Furthermore, the court failed to note that McLaughlin may have actually been prejudiced by the government—not directly because of the improper service, but rather because if the suit proceeded, he would need to recall events, witnesses, and documents that gave rise to a cause of action ten years earlier. The government clearly could have brought suit earlier in the statute of limitations but declined to do so. Thus, while the delay in service may not have directly prejudiced McLaughlin, the court may not have been correct in stating that the situation caused him "zero prejudice."[104]

The opinion's final paragraph sheds some light on the manner in which the court employed its discretion in granting the extension. The court expressed displeasure that a dismissal would give McLaughlin a three-million-dollar windfall, stating that "[dismissal] would have amounted to fining the government $3 million for doing something that did no harm to anyone and handing over the proceeds of the fine to a wrongdoer."[105] Thus, the court revealed what may have been its true motivation in deciding the case. As the next Section discusses, this manner of judicial discretion is but one reason why the circuits should adopt the excusable neglect standard.

IV. THE EXCUSABLE NEGLECT STANDARD IS BOTH CONSISTENT WITH THE PURPOSE OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SERVES AS A MORE PRACTICAL APPLICATION OF SERVICE OF PROCESS RULES IN FEDERAL COURT

The excusable neglect standard is preferable to the judicial discretion standard when a plaintiff moves to extend the time for service of process after the 120-day time period has expired. First, the statutory language of Rule 6(b) clearly evinces a legislative intent to impose a relatively harsh standard upon

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[102] *See id.* at 700–01.

[103] *See supra* Part I.B.2.

[104] *See McLaughlin*, 470 F.3d at 701.

[105] *Id.*

plaintiffs who fail to meet the relevant deadlines of the Federal Rules of Civil Procedure. Second, the excusable neglect standard more accurately reflects the legislative intent to define strict but fair standards in the service of process rule following the 1983 and 1993 amendments to Rule 4. Third, the excusable neglect standard more strongly motivates plaintiffs to meet their deadlines and justly penalizes plaintiffs whose inexcusable failures to meet such deadlines prolong litigation proceedings. Finally, the excusable neglect standard is favorable because it provides concrete guidelines for courts to follow and helps to reduce the potential inequities that accompany the exercise of judicial discretion.

A. A Detailed Analysis of the Text of 4(m) and 6(b) Evidences the Excusable Neglect Standard as the Proper Standard for Extensions After the 120-day Deadline Has Passed

The Seventh Circuit in *McLaughlin* noted that Rule 4(m) and Rule 6(b) contain seemingly different standards regarding an extension of the service time after the 120-day period has expired.[106] An examination of both statutes, however, suggests that Rule 4(m) was not intended to operate independently of Rule 6(b) and that Rule 6(b) was not intended to yield to Rule 4(m). Stated simply, Rule 6—including its subsections—applies to the entirety of the Federal Rules of Civil Procedure unless specified otherwise. The statutory language of Rules 6(a) and 6(b) fully supports this notion. Rule 6(a) begins with the phrase, "[t]he rules apply in computing any time period specified in these rules."[107] Such a phrase clearly evidences the legislative desire for Rule 6(a) to apply to each and every Federal Rule of Civil Procedure. In similar fashion, Rule 6(b) begins with, "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time."[108] Clearly then, Rule 6(b) was intended to apply to each and every instance in which a Federal Rule requires that an act be done within a certain time frame. Undoubtedly, Rule 4(m) fits this description perfectly as it

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[106] *See id.* at 700.
[107] FED. R. CIV. P. 6(a).
[108] *Id.* 6(b)(1).

demands that a specific act (service of process on the defendant) be done by a specific person (a plaintiff) within a specific time period (120 days after filing the complaint).[109]

Nowhere within Rule 6(b) can one find any language that allows Rule 4(m) to operate independently of Rule 6(b). Indeed, if Rule 4(m) was to encompass a standard other than that laid out in 6(b), it could have stated so on its face. In fact, the statutory language of Rule 6(b) actually does contain a number of exceptions to which 6(b) does not apply. The final sentence in Rule 6(b) proclaims that "[a] court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow."[110] Thus, Rules 50(b) and (c)2, 52(b), 59(b), (d) and (e), and 60(b) operate independently of Rule 6(b), and the standards to extend those respective time periods, if they so exist, are evident in the separate rules themselves.[111] Had the drafters intended for Rule 4(m) to have its own, more lenient standard for enlarging the time period for service, they could have simply added Rule 4(m) to the laundry list of statutes to which Rule 6(b) does not apply.

In the same vein, Rule 4(m) contains no language that contemplates a plaintiff's motion to extend the service period. Rule 4(m) clearly addresses a defendant's motion to dismiss and lays out the "good cause" standard for an *automatic* extension of the service time, but it is silent on a plaintiff's motion to extend the service period. Furthermore, considering that Rule 4(m) was enacted fewer than twenty-five years ago and has since been amended multiple times, there was ample opportunity to address the enlargement issue in the text of Rule 4(m). If Rule 4(m) was intended to operate independently of Rule 6(b), it could have said so in the language of Rule 4(m) or it could have at least addressed a plaintiff's motion for enlargement. Because Rule 6(b) contemplates a standard for enlargement motions that applies to each and every Federal Rule of Civil Procedure, it seems quite clear that the excusable neglect standard in Rule 6(b) controls.

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[109] *See id.* 4(m).
[110] *Id.* 6(b)(2).
[111] *See id.*

Finally, support for the excusable neglect standard is evident in the manner in which courts have chosen one standard over the other. In *McGuire v. Turnbo*[112] and *Turner v. City of Taylor*,[113] the Fifth and Sixth Circuits, respectively, chose the excusable neglect standard in Rule 6(b) as if there was no alternative.[114] Without explanation and without hesitation, both courts, independently of one another, turned to the statutory language of 6(b) for guidance in determining the standard to employ when the plaintiff moved to enlarge the service period after the 120 days had expired.[115] Simply put, both courts recognized that Rule 6(b) was the place in the Federal Rules of Civil Procedure in which the controlling law was found.

In contrast, the Seventh Circuit in *United States v. McLaughlin*,[116] wrestled with the issue of which standard to use before selecting the judicial discretion standard and first discredited the excusable neglect standard. The Seventh Circuit speculated that the divergent standards in 4(m) and 6(b) were an accident[117] and distinguished Rule 4(m) from Rule 6(b) because 6(b) was enacted to ensure the "finality of litigation," whereas 4(m) concerns "the commencement of litigation."[118] Neither argument is particularly appealing.

It is highly unlikely that the divergent standards in 4(m) and 6(b) flow from a legislative gaffe. As noted earlier, 4(m) has been revised twice since 1983, including once post-*McLaughlin*. If a mistake was made by including two standards, the problem could have easily been remedied one way or the other in the 2007 amendments. For fourteen years, no legislative body has seen the need to clarify itself, so it is simply unlikely that a mistake was made in the first place. Furthermore, that the Rule 6(b) standard should only govern matters of "finality" in litigation is untrue. Again, the statutory text of Rule 6 unambiguously purports to govern all time periods in the Federal Rules except the rules mentioned in the last sentence of Rule 6(b). There are no qualifying remarks in the text of Rule 6(b) regarding the finality or commencement of actions, and a court would be wise

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[112] 137 F.3d 321 (5th Cir. 1998).
[113] 412 F.3d 629 (6th Cir. 2005).
[114] *See McGuire*, 137 F.3d at 324; *Turner*, 412 F.3d at 650.
[115] *See id.*; *see also McGuire*, 137 F.3d at 324.
[116] 470 F.3d 698 (7th Cir. 2006).
[117] *See id.* at 700.
[118] *See id.*

not to invent such an argument. In summation, the Fifth and Sixth Circuits looked to the plain meaning of Rule 6(b) and applied it without hesitation, whereas the Seventh Circuit unreasonably stretched its logic to discount Rule 6(b) as inapplicable.

B. The Excusable Neglect Standard More Strongly Serves the Purpose of the Federal Rules of Civil Procedure

Rule 1 of the Federal Rules of Civil Procedure explicitly states that the Rules exist to "secure the just, speedy, and inexpensive determination of every action."[119] The following analysis of the excusable neglect standard with respect to these three goals of the Federal Rules of Civil Procedure shows that the excusable neglect standard is indeed preferable to the judicial discretion standard.

1. Just Determination of Cases

The excusable neglect standard adequately allows for the "just" determination of cases. One of the explicit purposes of Rule 4 is to ensure that a defendant is adequately notified of an impending suit and to allow the defendant to prepare materials for litigation.[120] It is this prejudice done upon a defendant that may turn the 120-day requirement from one of procedural technicality to one of substantive merit. While it may seem ridiculous to deprive a plaintiff of his day in court due to a procedural time limit, the limit itself exists to protect the defendant's substantive ability to defend on the merits. Thus, while the tardy plaintiff violates a procedural rule, the consequence of the violation is often one of substance.

The plaintiff who waits until the statute of limitations has nearly run, then fails to serve the defendant within 120 days, then fails to move for an extension of the service period, increases the probability that the defendant suffered prejudice in the case. Hence, the balancing act between the "open-door policy of the federal court system and the mandate in Rule 1"[121] is preserved in that a tougher standard for a subpar plaintiff increases the chances that (1) lazy or delinquent plaintiffs will justifiably lose

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[119] FED. R. CIV. P. 1.

[120] *See* Hoffman v. United Telecomms., Inc., 575 F. Supp. 1463, 1483 (D. Kan. 1983).

[121] 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 370.

their day in court, and (2) plaintiffs who may potentially prejudice defendants will be motivated to adhere to the deadlines prescribed in the Federal Rules. The excusable neglect approach takes this balancing act into consideration without allowing a court to flippantly grant the extension if no prejudice is apparent, as the Seventh Circuit unjustifiably did in *McLaughlin*. In other words, if a defendant suffers no prejudice as a result of the improper service, it will be relatively easier for the plaintiff to satisfy the otherwise difficult excusable neglect standard.

2. Speedy Determination of Cases

The excusable neglect standard also ensures "speedy" litigation. First, the standard motivates plaintiffs to accomplish service early in the 120-day requirement. Plaintiffs who attempt service relatively soon after filing the complaint but encounter difficulties serving the defendant will be able to take advantage of the freely granted extensions under Rule 6(b) when the motion is made prior to the expiration of the 120 days. Furthermore, the higher standard for tardy motions to extend will also motivate plaintiffs to file their complaints well within the statutes of limitations. As David Siegel writes, Rule 4's "very generosity may prove the plaintiff's undoing, lulling the plaintiff into casualness until the bell is about to ring. If the period lapses when the statute of limitations is near at hand, the result can be disaster."[122] In other words, "[p]laintiffs who manage to file the complaint just under the wire will have to stone with punctilio now for the laxity of which they were guilty before."[123] The gravity of a smaller margin of error regarding service of process should motivate plaintiffs to file their claims well before the expiration of the relevant statutes of limitations. This will certainly help to avoid egregious lapses in time like the one in *McLaughlin*, where the plaintiff waited until a few days prior to the expiration of a ten-year statute of limitations and then failed to properly serve the defendant until 271 days after filing the complaint. Such egregious delays likely inflict prejudice upon a defendant, who may not even recall the events that gave rise to the cause of action a decade earlier.[124]

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[122] Siegel, *supra* note 16, at 31–32.

[123] *Id.* at 37.

[124] For a more thorough examination of *McLaughlin*, see *supra* Part III.

3. Inexpensive Determination of Cases

The excusable neglect standard is also consistent with the purpose of the Federal Rules of Civil Procedure, which is to provide "inexpensive" litigation of matters.[125] It may be true that the harsher standard applied to extensions will increase the number of cases dismissed without prejudice, thus forcing some plaintiffs to refile. The negligible cost increases in refiling will, however, be heavily outweighed by the decreased case backlog in federal court. As Charles Wright and Arthur Miller point out, higher standards for service "should motivate the serving party to complete the task expeditiously, [and] will help ease the increasing backlog of cases in the federal courts and the delay in their adjudication."[126]

C. *The Excusable Neglect Standard Provides a More Structured Approach for Judges To Follow and Helps Limit the Potential for Inconsistent or Inequitable Decisions Both Across and Within Circuits*

The excusable neglect standard, while founded in equity and designed to account for the unique circumstances of each case, provides a more concrete rule than the judicial discretion standard, thus allowing judges to approach cases with a predictability that more likely ensures a just outcome. In effect, the excusable neglect standard is similar to the judicial discretion standard with one major difference: The excusable neglect standard is much harder to satisfy and, therefore, provides a safeguard for defendants against a judge with a bias toward an undeserving plaintiff. While both standards purport to examine the totality of the circumstances surrounding a particular case, "the excusable neglect standard has consistently been held to be 'strict,' and can be met only in extraordinary cases."[127] Hence, a judge is at least provided with some guidance

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[125] FED. R. CIV. P. 1.

[126] 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 370.

[127] Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir.1989) (citing Reinsurance Co. of Am. Inc. v. Administratia Asigurarilor de Stat, 808 F.2d 1249, 1251 (7th Cir. 1987)). Because both standards examine a totality of the circumstances, but the excusable neglect standard is more difficult to satisfy, it is not surprising that some courts have likened the excusable neglect standard to the good cause standard in Rule 4(m); both standards examine the totality of circumstances and both standards are more difficult to satisfy compared to the judicial discretion standard. *See* MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1097 (3d Cir. 1995).

as to how the various equitable factors should weigh against one another, and a defendant is properly protected against an undeserving plaintiff who makes a sympathetic appeal to a biased judge.

Said one commenter regarding the use of judicial discretion standards in relation to the Federal Rules of Civil Procedure:

> The problem, of course, with such an individualized approach is that it necessarily relies upon the differential knowledge, skill, interest, and attention of district court judges. Wholesale reliance upon the wisdom of an imperfect, substantially overworked federal judiciary is simply far from the bright-line rule that is increasingly the ideal of contemporary adjudication.[128]

Hence, allowing for broad judicial discretion is not only wasteful of precious judicial resources, but also runs contrary to the purpose of the Federal Rules—providing for the just adjudication of each matter.

CONCLUSION

Service of process is crucial to the commencement of an action under the Federal Rules of Civil Procedure. Since the responsibilities of serving process on a defendant were shifted to the plaintiff with the 1983 amendments to the Federal Rules, federal courts have struggled to "harmonize the open-door policy of the federal court system and the mandate in Rule 1 promoting the 'just, speedy, and inexpensive determination of every action.' "[129] While courts of course prefer to dispose of lawsuits on the merits, a plaintiff who fails to serve a defendant within the 120-day timetable, fails to show good cause for the failure, fails to move for an extension within the 120-day period, and files the suit so close to the expiration of the statute of limitations that a dismissal without prejudice would preclude the plaintiff from bringing suit again simply does not deserve a lenient standard in assessing whether to dismiss the case. An excusable neglect standard, set forth clearly in Rule 6(b), should be employed in these types of situations. The standard is harsh but fair, especially considering the degree to which a plaintiff must dawdle to implicate Rule 6(b). Ultimately, the excusable neglect

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[128] Shaun P. Martin, *Substitution*, 73 TENN. L. REV. 545, 603 (2006).

[129] 4B WRIGHT & MILLER, *supra* note 8, § 1137, at 370 (quoting FED. R. CIV. P. 1).

standard takes into account all equitable circumstances of the situation without affording judges too much discretion over the ultimate disposition of the case and should be adopted in lieu of the less preferable judicial discretion approach.